(5)

No. 96-1584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

This brief *amicus curiae* is submitted in support of Petitioner Terry Campbell. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to

the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

Among the NACDL's stated objectives is the

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

promotion of the proper administration of criminal justice, which includes the participation of all segments of the community in the criminal justice system via jury service on petit and/or grand juries, and the concurrent elimination of any policies of exclusion of any groups from that participation.

As a result, NACDL, consistent with its mission, files this brief *amicus curiae* in support of petitioner's claim that he possesses standing to challenge the systematic exclusion of blacks from the position of grand jury foreperson in the state of Louisiana even though he is not a member of the excluded class.

STATEMENT

Amicus adopts petitioner's statement of the case.

SUMMARY OF ARGUMENT

In *Taylor v. Louisiana*, 419 U.S. 522, 535-36 (1975), this Court, in holding that "exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community[,]" noted that while "this judgment may appear a foregone conclusion from the pattern of some of the Court's cases over the past 30 years . . . no case had squarely held" that such exclusion constituted a constitutional violation.

Here, the result is also a "foregone conclusion" based on what is now more than 50 years of this Court's cases, and is open only because the issue has not been squarely addressed by this Court. Indeed, all of the cases on the subject of jury venire exclusion support petitioner's claim: that an Equal Protection or "fair cross section" challenge to the systematic exclusion of blacks from the position of grand jury foreperson in the State of Louisiana may be instituted by a white defendant.

For example, this Court has already held that a defendant may make an Equal Protection challenge to the exclusion of a particular group from a petit jury regardless whether the defendant is the same race as the excluded group. In addition, this Court has extended the principles of Equal Protection to the composition of the grand jury as well.

Similarly, this Court has already held that the race of the defendant is immaterial in the context of a Sixth Amendment "fair cross section" claim with respect to the composition of a petit jury. Again, the "fair cross section" protections have been extended to the grand jury, too.

Thus, all that remains is the application of these postulates to the position of foreman of the grand jury in the State of Louisiana, a proposition which this Court has, in the context of a Tennessee state court case, already assumed without deciding. Permitting any defendant, regardless of his or her race, to institute Equal Protection

and "fair cross section" challenges to the exclusion of a particular group from serving as grand jury forepersons is simply the logical, necessary, and inexorable application of this Court's prior caselaw.

In ruling to the contrary, the Louisiana Supreme Court failed to recognize the clear line established by this Court, and instead misapplied another decision by this Court that is entirely distinguishable from this case. In fact, the case upon which the Louisiana Supreme Court relied was not even a case involving standing; nor did it even involve an Equal Protection or "fair cross section" claim.

Accordingly, *amicus* respectfully submits that the decision of the Louisiana Supreme Court should be reversed, and Petitioner's conviction vacated.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT PETITIONER LACKED STANDING TO CHALLENGE THE EXCLUSION OF A PARTICULAR CLASS FROM THE POSITION OF GRAND JURY FOREPERSON BECAUSE HE WAS NOT A MEMBER OF THE EXCLUDED CLASS

As noted above, that the question presented for review in this case has not been answered directly by this Court, in light of all of this Court's decisions addressing closely related issues, is simply because the precise question has not been previously considered by this Court.

As detailed below, each of this Court's opinions in cases involving closely analogous questions supports the adoption of petitioner's position: that under either the Equal Protection Clause of the Fourteenth Amendment, or the "fair cross-section" guarantee embodied in the Sixth Amendment, a defendant possesses standing to challenge the racial composition of grand jury forepersons regardless whether the group excluded is of the same race as the defendant.

In general, the notion that a constitutional claim of exclusion of a particular class from jury service must be raised by a defendant who is a member of that excluded class has been flatly rejected by this Court. In *Peters v.*

Kiff, 407 U.S. 493 (1972), six Justices of this Court found that a white defendant could raise a claim due to the exclusion of blacks from both the petit jury and grand jury. 407 U.S. at 498-99, 505-07.

Justices Marshall, in an opinion joined by Justices Douglas and Stewart, stated that "when a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim." 407 U.S. at 498.

The opinion pointed out that any objection to defendant's standing "takes too narrow a view of the kinds of harm that flow from discrimination in jury selection." 407 U.S. at 498. Citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), this Court explained that "the exclusion of Negroes from the jury service injures not only defendants, but also other members of the excluded class[,]" since it "denies the class of potential jurors the 'privilege of participating equally . . . in the administration of justice,' . . . and it stigmatizes the whole class[.]"

Justice White, joined by Justices Brennan and Powell, also expressly allowed the white petitioner in *Peters* to "challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him." 407 U.S. at 507.

A. *Petitioner Has Standing to Make An Equal Protection Challenge*

In *Castaneda v. Partida*, 430 U.S. 482, 492-93 (1977), this Court held that a criminal defendant may attack a conviction on the ground of an Equal Protection violation against an identifiable group in the composition of the grand jury.

Subsequently, in *Powers v. Ohio*, 499 U.S. 400 (1991), this Court held explicitly that standing to bring an Equal Protection challenge to the exclusion of a class of jurors did not require identity between the race of the defendant and that of the excluded class.

In ruling that a white defendant possessed standing to object to peremptory challenges exercised against blacks, this Court described its holding as stating that "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges." 499 U.S. at 416.

This Court upheld the defendant's standing to make an Equal Protection claim in *Powers* "because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' *Rose v. Mitchell*, 443 U.S. 545 [ ] (1979), and places the fairness of a criminal proceeding in doubt." 499 U.S. at 411.

Likewise, in *Vasquez v. Hillery*, 474 U.S. 254

(1986), this Court reaffirmed that the principles of Equal Protection apply in the grand jury with the same force as they do at trial. *See also Rose v. Mitchell, supra*, 443 U.S. at 556.

Accordingly, it is the clear mandate of this Court that a defendant need not be of the same race as the excluded class to possess standing to institute an Equal Protection challenge to the exclusion of that class from grand jury service.

B. *Petitioner Has Standing to Make A "Fair Cross Section" Challenge*

The same is true with respect to a claim made pursuant to the constitution's "fair cross section" guarantee. In *Taylor v. Louisiana*, *supra*, and again in *Duren v. Missouri*, 439 U.S. 357 (1979), this Court held that "[a] criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class." 439 U.S. at 359 n. 1, *citing Taylor*, 419 U.S. at 526.

In *Taylor*, the Court pointed out that "there is no rule that claims such as [the defendant] presents may be made only by those defendants who are members of the group excluded from jury service." 419 U.S. at 526. Thus, in both *Taylor* and *Duren*, a male defendant had standing to challenge the exclusion of women from a petit jury.

Also, as is the case with the Equal Protection clause, the "fair cross section" guarantee applies in the grand jury as well. *See United States v. Osorio*, 801 F. Supp. 966, 972-74 (D. Conn. 1992); *United States v. Biaggi*, 680 F. Supp. 641, 653-55 (S.D.N.Y. 1988), *aff'd*, 909 F.2d 662 (2d Cir.), *cert. denied*, 499 U.S. 904 (1990); *United States v. Gerena*, 677 F. Supp. 1266, 1272 (D. Conn. 1986), *aff'd sub nom. United States v. Maldonado-Rivera*, 922 F.2d 934, 970 (2d Cir. 1990), *cert. denied*, 501 U.S. 1233 (1991).

In *Biaggi*, *supra*, the District Court noted that "[a]lthough the sixth amendment's fair-cross-section test applies, strictly speaking, only to petit juries, the Supreme Court has banned, under the due process clause of the fifth amendment, exclusion of any 'large and identifiable segment of the community' from either grand or petit juries. 680 F. Supp. at 653, *citing Peters v. Kiff*, *supra*, 419 U.S. at 526.

Indeed, in *Peters v. Kiff*, *supra*, while this Court did not resolve the "fair cross section" issue because in that case the petitioner's trial had occurred before the Sixth Amendment's petit jury clause was made binding on the states [via *Duncan v. Louisiana*, 391 U.S. 145 (1968)], this Court did note that

> if the Sixth Amendment were applicable here, and petitioner were challenging a post-*Duncan* petit jury, he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service.

407 U.S. at 500 (footnote omitted).[2]

The basis for the Court's conclusion applies with equal force to grand juries: "the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community." *Id.*

Thus, under either the Sixth Amendment, or the Due Process clause of the Fifth Amendment, the requirement of a "fair cross section" applies to grand juries. Otherwise, all of protections afforded in the context of the composition of a trial jury would be rendered meaningless, since, as this Court stated in *Taylor v. Louisiana*, *supra*,

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[2] In *Peters v. Kiff*, *supra*, this Court also noted that the "fair cross section" evolved from Equal Protection jurisprudence. 407 U.S. at 500 n. 9. As a result, logic dictates that the "fair cross section" guarantee, like the Equal Protection Clause from which it derived, applies to both petit and grand juries.

> [c]ommunity participation in the administration of criminal law [] is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

419 U.S. at 530.

Denying that essential "community participation" at the grand jury level, in the form of a "fair cross section," is as repugnant as it is in the context of a petit jury.

C. *Petitioner Has Standing to Challenge the Exclusion of Black Grand Jury Forepersons*

Since, as set forth above, this Court's prior cases clearly hold that Petitioner, regardless of his race in relation to the race of the excluded class, has standing to institute either an Equal Protection or "fair cross section" challenge to the grand jury, it remains only to apply that jurisprudence to the exclusion of blacks from the role of foreperson of a Louisiana state grand jury.

Faced with a challenge by black defendants to the exclusion of blacks from the position of foreperson of Tennessee state grand juries, this Court, in *Rose v. Mitchell*, *supra*, noted that it would

> assume without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire.

443 U.S. at 551 n. 4 (citation omitted).[3]

However, the Court did reaffirm its previously principles, namely that

> [b]ecause discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole, the Court has recognized that a criminal defendant's right

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[3] The Court did not have to decide the issue because it found that petitioners in *Rose v. Mitchell* failed to present a *prima facie* case of discrimination in violation of the Equal Protection Clause with respect to the selection of grand jury forepersons. 443 U.S. at 574.

> to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded.

443 U.S. at 556

That protection against exclusion includes the selection of the grand jury foreperson. Indeed, in *Guice v. Fortenberry*, 722 F.2d 496 (5th Cir. 1981), the Fifth Circuit reasoned that "[i]f convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination affecting only the foreman." 722 F.2d at 499. Consequently, the Fifth Circuit granted the habeas corpus petitions of two defendants because of the discriminatory selection of grand jury forepersons in the very same state of Louisiana, Respondent herein.[4]

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[4] The result in *Guice*, and the fact that racial discrimination in the selection of grand jury forepersons persists in Louisiana to this day, provides a perfect illustration of why defendants, regardless of their race, have standing to challenge the exclusion of identifiable classes from jury service, since obviously, in the seventeen years since *Guice*, the excluded class itself has not pursued any challenge to the discriminatory practice. *See, e.g., Powers v. Ohio*, 499 U.S. at 414-15 ("[t]he reality is that juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights") (citation omitted).

Nor does any decision by this Court hold or even suggest otherwise.[5] In fact, the Louisiana Supreme Court's reliance on this Court's decision in *Hobby v. United States*, 468 U.S. 339 (1984), is completely misplaced, since *Hobby*, in which this Court held that discrimination in the selection of federal grand jury forepersons did not deny the defendant Due Process, is entirely distinguishable in three dispositive respects:

(1) *Hobby* was not a standing case; instead, as this Court pointed out, "[t]he question presented . . . is the narrow one of the appropriate remedy for such a violation[]" of the proscription against racial discrimination in the selection of federal grand jury forepersons, 468 U.S. at 342;

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[5] The Fifth Circuit's decision in *United States v. Cronn*, 717 F.2d 164, 169 (5th Cir. 1983), that "equal protection considerations are not involved in the claim of a white male not to have females and racial minorities excluded from the judicial process as it is applied to him[,]" is, in light of *Powers v. Ohio*, *supra* (decided subsequently), plainly wrong.

(2) the petitioner in *Hobby* grounded his claim on the Due Process Clause only, a fact stressed by this Court, 468 U.S. at 347, which thereby distinguished *Hobby* from the Equal Protection claims raised in *Rose v. Mitchell, supra*. Thus, neither the Equal Protection nor "fair cross section" guarantees were implicated in *Hobby*;

(3) this Court's conclusion in *Hobby* – that the post of foreperson in the federal grand jury "cannot be said to have a significant impact upon the due process interests of criminal defendants[,]" *id.* – was premised on the finding that the foreperson in the federal grand jury possesses merely "ministerial powers . . . [and] performs strictly clerical tasks" (in contrast with the substantive role of the Tennessee state grand jury foreperson at issue in *Rose v. Mitchell, supra*). 468 U.S. at 348. Here, the system is much more like that in *Rose v. Mitchell* than its federal counterpart. Under Louisiana law, (in parishes other than Orleans) the foreperson is chosen by the court from the grand jury venire, and not from the already empaneled grand jury, as in federal system. *See* Louisiana Code of Criminal Procedure, Article 413. Thus, since the judge in Louisiana selects a

voting member of the grand jury (as the Tennessee court did in *Rose v. Mitchell*), Louisiana's grand jury forepersons are governed by the standards applied in *Rose v. Mitchell*.[6]

As a result, *Hobby* does not in any way defeat Petitioner's claim, which is fully consistent with the principles underlying this Court's repeated efforts at eradicating discrimination in jury selection, whether it be in a petit or grand jury. As this Court stated in *Powers v. Ohio, supra*, it has "not questioned the premise that racial discrimination in the qualification of jurors offends the dignity of persons and the integrity of the courts." 499 U.S. at 402.

In light of that simple but fundamental principle, which applies at each stage of selection, and to each juror

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[6] In light of the more substantive role played by the grand jury forepersons in Louisiana (than that found insufficient in *Hobby*), and the position of three Justices in *Peters v. Kiff, supra* that grand jury selection was protected by the Due Process Clause, Petitioner here also has standing to raise a Due Process challenge to the discriminatory selection of grand jury forepersons. However, if the Court sustains Petitioner's standing under either the Equal Protection Clause or the "fair cross section " guarantee, it need not reach the Due Process issue.

chosen, this Court explained in *Powers* that "[t]o bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." 499 U.S. at 415.

The same would be true here if the Louisiana Supreme Court's decision that Petitioner lacked standing to challenge the exclusion of blacks from the position of grand jury foreperson were affirmed. As a result, *amicus* respectfully submits that the decision of the Louisiana Supreme Court must be reversed, and Petitioner's conviction vacated.

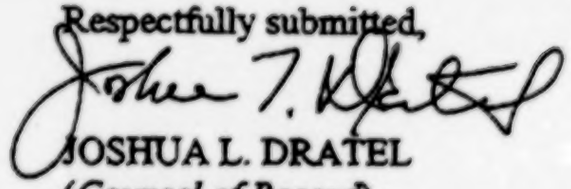
CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Petitioner's Brief, it is respectfully submitted that the decision of the Louisiana

Supreme Court should be reversed, and petitioner's conviction vacated.

Dated: 19 November 1997
New York, New York

Respectfully submitted,



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